

STATE OF SOUTH CAROLINA)	BEFORE THE ADMINISTRATOR
)	SOUTH CAROLINA DEPARTMENT
COUNTY OF RICHLAND)	OF CONSUMER AFFAIRS
SOUTH CAROLINA DEPARTMENT)	DOCKET NO. 2038
OF CONSUMER AFFAIRS,)	
)	
PETITIONER,)	
)	
VS.)	ORDER
)	
GARY PAYNE, INDIVIDUALLY)	
AND SOUTHERN FINANCIAL)	
SERVICES, INC.,)	
)	
RESPONDENTS.)	
_____))	

STATEMENT OF THE CASE

This matter came before me as a result of Petitioner's Notice of Hearing and Petition dated December 6, 2000. The Petition alleges that Respondent Gary Payne is the 100% owner of Respondent Southern Financial Services, Inc. ("SFS"), and that the Respondents currently maintain a \$10,000.00 surety bond issued by American Manufacturers Mutual Insurance Company. It further alleges that pursuant to its statutory duties to mediate and determine the merits of consumer complaints, the Petitioner had received four (4) complaints against the Respondents. Petitioner alleged that each complaint constituted violations of *S.C. Code Ann.* § 40-58-70 (5) concerning the collection of fees and subsection (3) of that Section which prescribes unconscionable or fraudulent business conduct on the part of a broker. With the Davis complaint, the allegation was that Respondents had taken illegal advance fees. In the Hucks complaint, the Petitioner alleged that loan proceeds had been illegally diverted or misappropriated into Respondents' business account. In the Taylor-Davis complaint, the Petitioner claimed that certain

proceeds to pay off creditors accounts were again diverted or misappropriated into the Respondents' account and not used to pay the creditors as those funds were specifically designated. Finally, in the Morton complaint, the Petition alleged that Respondents had accepted fifteen hundred (\$1,500.00) dollars after assuring Mr. Morton that his loan was approved in early December 2000, and there has been no closing or receipt of the \$1,500.00 to date. Petitioner additionally alleges that this occurrence also constituted violations of subsection (1) of Section 40-58-70 by making false promises likely to influence, persuade or induce an application for a mortgage loan or a mortgagor to take a mortgage loan because of Respondents' assertions that Mr. Morton was approved. Petitioner further cited these actions as evidence of Respondents' failure to use due diligence and make reasonable efforts to procure a loan on Mr. Morton's behalf.

Finally, Petitioner alleges that the totality of these actions and omissions have called into question whether Respondents maintain the required financial responsibility, experience, character and fitness to command the confidence of the community and to warrant the belief that the business may be operated fairly and efficiently, according to the purposes of the Mortgage Loan Broker Act.

The relief Petitioner seeks is (a) an Order requiring Respondents cease and desist violations of the Mortgage Loan Broker Law, (b) a finding (apparently) that Respondents have engaged intentionally or repeatedly in a course of violating the Mortgage Broker Act, (c) revocation or suspension of SFS's license as well as Respondent Gary Payne's certification to work as a mortgage broker employee on a temporary or permanent basis, (d) fines of between five hundred (\$500.00) for each offense and not more than five thousand (\$5000.00) for set of transactions or occurrences as provided by § 40-58-80 (c), and (e) an Order of refund to the

Huckses of \$8,315.45, to Ms. Taylor- Davis of \$14,000.00, and to Mr. Morton of \$1,500.00, and that Respondents' bond be increased to \$25,000.00 pursuant to *S.C. Code Ann.* § 40-58-80, as well as such other and further relief as I deem appropriate.

Originally scheduled for January 22, 2001, the hearing was postponed initially to because Respondent Gary Payne claimed that he had an incapacitating illness and a continuance was ordered until January 29, 2001 (Order of January 18, 2001). The matter was again postponed when Respondents' counsel was scheduled for Circuit Court trial on January 29 (Order of January 29, 2001). The matter came before me on February 9, 2001. Petitioner was represented by Danny R. Collins. Respondents were represented by William T. Toal. Stipulations and Affidavits were filed (Exhibits 1, 9, 15, 17, and 18). Testimony was taken from Neal Thompson, Jr., Daisy Hucks, William Maree, and Jane Shuler. The parties consented to admitting all 23 numbered Exhibits by stipulation.

SUMMARY OF TESTIMONIAL EVIDENCE

In addition to the Stipulations and Testimony cited above, Ms. Daisy Hucks testified that the Settlement Statement to her loan of October 13, 2000 identified the loan proceeds disbursement to be given to her and her husband in connection with a loan to add on to their home (Exhibit 3, line 1604, in the amount of \$8,315.45). She testified that the check for the proceeds were not distributed at closing, but were somehow expected by overnight courier on a Thursday and was delayed until Friday. October 13, 2000, the stated closing date of the transaction, was a Friday. It appears that the actual disbursal from the law firm took place on Wednesday, October 18 and that Respondent Payne had requested the opportunity to personally deliver the check to the Huckses (Exhibit 9). In any case, upon being informed on a Friday the

check had come by courier, she stated that she went to SFS's office and the Respondent Payne was leaving late in the day and said he had to get to another business before 5:00 p.m. and asked her if she could wait until Monday. She stated thereafter Mr. Payne gave her the run-around for three weeks. After complaining to SFS, the Huckses were given two checks written against the company's account, one for \$315.45 and the other for \$8000.00 (Exhibit 7). These checks were refused because there was no money in the account and they were closed (Testimony of Hucks). The Huckses complained to SFS and the closing lawyer, who sought to ascertain what happened to the proceeds check. According to attorney Brickle, Respondent Payne admitted to him that the proceeds check had been deposited into SFS's First Citizens account, albeit by "mistake" (Exhibit 9, paragraph 17). It was stipulated that the Huckses have been reimbursed, but this was done by the Bank upon an affidavit of forged endorsement (Exhibit 6).

Mr. Neal Thompson testified. He had sought Respondent Payne to assist him with securing financing for a double wide trailer and paying off his land in October 2000. A sale of a double wide home was arranged with Atlantic Coast Homes (Exhibit 10). In the process of closing, Atlantic Coast apparently revised the sale amount downward so the closing could go through. Neither the preliminary HUD 1 prepared by SFS and signed by the Thompsons (Exhibit 11) nor the HUD 1 prepared in connection with the closing (Exhibit 12) show a charge for the digging of a septic system or a survey of the property, although both were apparently ordered, performed and billed. Respondent Payne acknowledged responsibility for the oversight and indicated he would pay the bills outside of closing (Testimony of Thompson). He assured Mr. Thompson (*Id.*) and the law firm (Exhibit 13) that the checks were in the mail, but they were never forthcoming.

Mr. William E. Maree, the Department's Director of Consumer Services, testified. He stated the Department had received five complaints against SFS in the year 2000 and three in the prior year. He stated that SFS and Mr. Payne had a spotty record of responding to consumer complaints, only responding reasonably satisfactorily to the Josette Davis complaint in which she was refunded all but \$100.00 of the fees she advanced and chose not to pursue the complaint further.

FINDINGS OF FACT

1.) Respondents SFS and Gary Payne were served by the Notice of Hearing and Petition on or about December 6, 2000 (Exhibit 2).

2.) The Stipulation of Facts set forth in Exhibit 1 are hereby incorporated in these Findings of Fact.

3.) Respondent SFS, by and through Respondent Gary Payne, has engaged in diversion of funds earmarked for the borrowers or the creditors of borrowers (Exhibits 1- 9, 15-16, Testimony of Hucks).

4.) Respondent SFS, by and through Respondent Gary Payne, has demanded or accepted fees or charges from borrowers or prospective borrowers other than appraisal or other traditional third party fees (Exhibits 18 & 19).

5.) Respondent SFS, by and through Respondent Gary Payne, has prepared or caused to be prepared closing statements or disclosures in the Thompson loan for which services were contracted but the vendors received no disbursement. Respondent Payne acknowledged responsibility for this oversight but failed or refused to reimburse for these services (Exhibits 10-14, Testimony of Thompson).

6.) In the midst of the occurrences described in Paragraphs 1.) through 5.) above, Respondent Payne made evasive and deceptive statements to acquire proceeds checks, explain the disposition of proceeds checks, explain why the loans did not close or why the creditors were not paid.

7.) Respondents' responses to the nine complaints filed with the Department were likewise either non-responsive or evasive, with the possible exception of Ms. Josette Davis, who received from Mr. Payne all but one hundred dollars of the advance fee he had collected. The record indicates that other than Ms Davis, while other consumers may have been reimbursed by the banks involved, no others mentioned in this record have been reimbursed by the Respondents.

8.) In 1997, Respondent Gary Payne was an employee of Carolina Home Equity, Inc. He was terminated on an allegation that he had altered documents and as a result of the Department's investigation of the matter signed an Assurance of Discontinuance. While Respondent Payne makes no direct admission of wrongdoing in the Assurance, it does indicate, *inter alia*, in the event that he should in the future ever submit a falsified verification of mortgage or a verification of mortgage that is false, deceptive, or misleading or alter any loan documentation or submit any loan documentation that is false, deceptive, or misleading, the Assurance may be used in a hearing as evidence of its purport (Exhibit 23; Testimony of Shuler).

CONCLUSIONS OF LAW

1.) Notice provided in the matter was compliant with the Administrative Procedures Act, *S.C. Code Ann.* §§ 1-23-310 *et. seq.*

2.) Respondents' demand for or acceptance of advance fees as set forth in Paragraph 4.) of the Findings of Fact, above, constitutes violations of *S. C. Code Ann.* § 40-58-70

(5).

3.) Respondents diversion or misappropriation of moneys owed for borrowers or creditors proceeds constitute violations of *S.C. Code Ann.* § 40-58-70 (3) by a use of a practice which is unconscionable in light of the regular practices of a mortgage broker or operates as a fraud in connection with the making or purchase or sale of a mortgage loan.

. 4.) With regard to Mr. Morton and Ms. Davis, Respondents violated *S.C. Code Ann.* § 40-58-70 (1) by misrepresenting material facts or by making false promises likely to influence, persuade or induce a mortgagor to make a mortgage loan by indicating that they were approved or would be approved for a loan when that was not the case.

5.) Respondents also violated *S.C. Code Ann.* § 40-58-70 (4) by failing to use due diligence and make reasonable efforts to procure a loan on behalf of Mr. Morton and Ms. Davis.

6.) Respondents have engaged intentionally or repeatedly in violations of the Mortgage Loan Broker Act.

7.) These actions, in their totality, call into serious question whether Respondents maintain the required financial responsibility, experience, character and fitness to command the confidence of the community and to warrant the belief that the business may be operated fairly and efficiently, according to the purposes of the Mortgage Loan Broker Act, pursuant to *S.C. Code Ann.* § 40-58-60 (A).

I also find that:

8.) Respondents should be required to cease and desist violations of the Mortgage Loan Broker Act;

9.) Respondent SFS's license as a mortgage loan broker and Respondent Payne's

certification to work as a broker employee should be permanently revoked, pursuant to *S.C. Code Ann.* §§ 40-58-55 and -90 (C);

10.) The Petitioner also asked for fines against the Respondents for the various violations in the amount of five hundred (\$500.00) dollars per offense, with a maximum of five thousand (\$5000.00) for offenses involving the same set of transactions or occupancies pursuant to *S.C. Code Ann.* § 40-58-80 (C). Under that section, I find the following fines to be specifically appropriate:

a.) Regarding Josette Davis for violation of Section 40-58-70 (5) for taking an advance fee –	\$500.00
b.) Regarding Josette Davis for violation of Section 40-58-70 (3) for engaging in unconscionable or fraudulent conduct or practices –	\$500.00
c.) Regarding the Huckses for violation of Section 40-58-70 (3) for engaging in unconscionable or fraudulent practice --	\$500.00
d.) Regarding Ms. Taylor-Davis for violation of Section 40-58-70 (3) for engaging in unconscionable or fraudulent practice --	\$500.00
e.) Regarding Mr. Morton for violation of Section 40-58-70 (5) for taking advance fees --	\$500.00
f.) Regarding Mr. Morton for violation of Section 40-58-70 (1) for misrepresenting that his loan was approved --	\$500.00
g.) Regarding the totality of these violations and others shown in the record for failure to maintain requisite financial responsibility, character and fitness to command the confidence of the community and warrant the belief that the business may be operated honestly, fairly and efficiently according to the Act --	\$500.00
Total	<hr/> \$3500.00

Of these fine amounts, the Department will waive dollar for dollar each dollar proven to have been reimbursed to the individual consumers relating to the violations. The

\$500.00 fine provided for the failure to maintain financial responsibility, character and fitness set forth in paragraph g.), above, will be retained by the Department as a partial offset of its administrative costs in this matter.

11.) Counsel suggested a less than permanent suspension of Respondents' license and certification, and possibly rehabilitative counseling for Mr. Payne. Frankly, under the existing circumstances, it appears unlikely Respondents will be able to demonstrate financial responsibility to the appropriate bonding companies. While I cannot bind any other Administrator or possible future regulator of this industry, I do not anticipate that I would favorably consider a petition by Respondents, or either of them, to work in the business any time in the foreseeable future, and in any case would not consider it until and unless there is a clear demonstration that all parties victimized by these transactions, including the consumers, banks and the bonding company, have been made whole, with interest from the date of this Order.

12.) I do not understand the Mortgage Loan Broker Act to give me a means of directly ordering reimbursement to the consumers other than through assessments against the bond (Exhibit 22). By this Order I am directing the Staff to give the bonding company, the affected consumer and any other known parties in interest notice and an opportunity to show whether or not assessments against the bond are appropriate.

13.) This Order supplements my Order of February 9, 2001. No further Order is necessary.

AND IT IS SO ORDERED.

Philip S. Porter
Administrator

Columbia, S. C.
_____, 2001